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AUG 15 2008

In re Application of :
Kevin O'Rourke :
Application No. 09/939,899 : **DECISION ON PETITION**
Filed: August 27, 2001 :
Attorney Docket No. 2001P07802US01 :

This is a decision on the petition, filed February 20, 2008 and resubmitted May 19, 2008, which is being treated as a petition under 37 CFR 1.181 (no fee) requesting withdrawal of the holding of abandonment in the above-identified application.

The petition is **DISMISSED**.

Any request for reconsideration of this decision should be filed within two (2) months from the mail date of this decision. *Note* 37 CFR 1.181(f). The request for reconsideration should include a cover letter and be entitled as a "Renewed Petition under 37 CFR 1.181 to Withdraw the Holding of Abandonment."

This application was held abandoned for failure to timely pay the issue and publication fees on or before January 4, 2008, as required by the Notice of Allowance and Fee(s) Due (Notice), mailed October 4, 2007.

Petitioner asserts that the Notice dated October 4, 2007 was not received.

A review of the written record indicates no irregularity in the mailing of the Notice, and, in the absence of any irregularity, there is a strong presumption that the Notice was properly mailed to the practitioner at the address of record. This presumption may be overcome by a showing that the Notice was not in fact received. In this regard, the showing required to establish the failure to receive the Notice must consist of the following:

1. a statement from practitioner stating that the Notice was not received by the practitioner;
2. a statement from the practitioner attesting to the fact that a search of the file jacket and docket records indicates that the Notice was not received; and

3. a copy of the docket record where the nonreceived Notice would have been entered had it been received must be attached to and referenced in the practitioner's statement.

See MPEP § 711.03(c) under subheading "Petition to Withdraw Holding of Abandonment Based on Failure to Receive Office Action," and "Withdrawing the Holding of Abandonment When Office Actions Are Not Received," 1156 Official Gazette 53 (November 16, 1993).

The petition fails to satisfy all of the above-stated requirements. In this regard, although petitioner does state that the Notice was not received and provides a copy of a docket report for the current case where the nonreceived Notice would have been entered had it been received, this alone is not sufficient. The showing required must include a statement from the practitioner describing the docketing system and indicating that the docketing system is sufficiently reliable. *See* MPEP § 711.03(c), I, A. The petition does not describe the docketing system or establish its reliability.

Moreover, a copy of the practitioner's record(s) required to show non-receipt of the Notice should include the master docket for the firm. That is, if a three month period for reply was set in the nonreceived Notice, a copy of the master docket report showing all of the replies docketed for a date three months from the mail date of the nonreceived Notice must be submitted as documentary proof of nonreceipt of the Notice. If no such master docket exists, practitioner should so state and provide other evidence such as, but not limited, the following: the application file jacket; incoming mail log; calendar; reminder system; or the individual docket record for the application in question.

Accordingly, absent the required evidence to establish nonreceipt of the Notice of Allowance and Fee(s) Due, the petition requesting withdrawal of the holding of abandonment cannot be granted at this time.

If petitioner cannot supply the evidence necessary to withdraw the holding of abandonment, or simply does not wish to, petitioner should consider filing a petition under 37 CFR 1.137(b) stating that the delay was unintentional. Public Law 97-247, § 3, 96 Stat. 317 (1982), which revised patent and trademark fees, amended 35 U.S.C. § 41(a)(7) to provide for the revival of an "unintentionally" abandoned application without a showing that the delay in prosecution or in late payment of the issue fee was "unavoidable." This amendment to 35 U.S.C. § 41(a)(7) has been implemented in 37 CFR 1.137(b). An "unintentional" petition under 37 CFR 1.137(b) must be accompanied by the appropriate petition fee.

The filing of a petition under 37 CFR 1.137(b) cannot be intentionally delayed and therefore must be filed promptly. A person seeking revival due to unintentional delay cannot make a statement that the delay was unintentional unless the entire delay, including the date it was discovered that the application was abandoned until the filing of the petition to revive under 37

CFR 1.137(b), was unintentional. A statement that the delay was unintentional is not appropriate if petitioner intentionally delayed the filing of a petition for revival under 37 CFR 1.137(b).

Further correspondence with respect to this matter should be delivered through one of the following mediums:


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Telephone inquiries concerning this decision should be directed to Christopher Bottorff at (571) 272-6692.


David Bueci
Petitions Examiner
Office of Petitions